

This letter discusses the issue of nexus. See *Quill v. North Dakota*, 112 S.Ct. 1902 (1992). (This is a GIL.)

February 5, 1999

Dear Mr. Xxxxx:

This letter is in response to your letter dated December 28, 1998. The nature of your letter and the information you have provided require that we respond with a General Information Letter which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

Per our recent discussion and on behalf of our client, we are requesting a ruling regarding the applicability of the sales/use tax to the information service being provided to customers located within your State. We would also appreciate your response as to whether our client is responsible for collecting and remitting the tax based on its limited activities conducted within the State.

Our client, which is located in CITY, has developed a PRODUCT which could be used by money management firms, securities dealers and other fixed income market professionals, insurance companies, banks, corporate pension fund departments, and other research professionals. The PRODUCT provides access to our client's and/or its affiliates central site databases and financial models including a mortgage database, fixed income database, historical database and a research library (such databases are located in CITY). The PRODUCT provides customers the capability of using our client's electronic reports, sectors and scenario files or of customizing them. The PRODUCT operates through a high speed network and distributed client/server work station technology. The servers are located in our client's CITY office and users are connected through a wide area network or analog telephone line. The PRODUCT can run on a personal computer or work station along with other applications and does not require a dedicated machine.

Our client charges its customers a fee in order to access the PRODUCT. Our client typically sells a router and a modem to its customers during the initial installation of the PRODUCT and imposes a separate charge for such equipment. Regarding our client's activities within the State it is our understanding that leads to potential customers may be obtained from referrals, employees of an affiliated company and/or the client's employees. The affiliated company, not our client, has an office in the State. Once a potential customer has been introduced to our client it is possible that, on occasion, a follow up visit to the customer's facility be made by an employee of our client in order to demonstrate the PRODUCT's capabilities. If the potential customer orders the PRODUCT, employees of our client may visit the customer to provide training or technical assistance.

Based on the above, we request a ruling as to the following:

1. Is the activity within the State deemed to be subject to tax?
2. If yes, is our client required to collect and remit the tax based on its limited activities conducted within the State?
3. Would the answer to question #2 be different if our client's in State activities are conducted by employees of the affiliated company.

It should be noted that the company is not under audit and does not have pending litigation with the Illinois Department of Revenue regarding the above issue. It should also be noted that to the best of our knowledge taxpayer has not requested a ruling on this issue prior to this date.

As requested we have attached a signed copy of a Power of Attorney and your response to our initial request for a no name ruling.

If you have any questions or need additional information, please call me at (212) 768-2233.

We are unable to comply with your request to issue a private letter ruling on the issue of whether your client would have nexus for Telecommunications Excise Tax and Retailers' Occupation Tax/Use Tax purposes. The Department has found that determinations of nexus in this area are so highly fact-dependent that the disclosure requirements of 2 Ill. Adm. Code 1200.110(b)(1) can rarely be satisfied within the context of a written narrative. Consequently, the best manner to determine nexus in this area is for a Department auditor to examine all relevant facts and information.

In order for the Department to issue a Private Letter Ruling, a complete statement of all material facts including a detailed description of the transaction must be submitted with the ruling request. See 2 Ill. Adm. Code 1200.110(b)(1). Based upon the limited amount of information contained in your request, the Department is unable to issue a Private Letter Ruling. In addition, your request did not include (i) a statement of authorities supporting the taxpayer's views, an explanation of the grounds for that conclusion and the relevant authorities to support that conclusion and (ii) a statement of authorities contrary to the taxpayer's views. See 2 Ill. Adm. Code 1200.110(b)(5 & 6).

We are, however, providing the following general information for your consideration. Out-of-state retailers are considered to fall within the definition of a "retailer maintaining a place of business in Illinois" (defined in the enclosed copy of 86 Ill. Adm. Code 150.201) when they perform any of the types of activities listed in 86 Ill. Adm. Code 150.201(i). The provisions of this regulation are subject to the U.S. Supreme Court ruling in *Quill v. North Dakota*, 112 S.Ct. 1902 (1992), which set forth guidelines for determining what nexus requirements must be met before a business is properly subject to a state's tax laws. *Quill* invoked a two-prong analysis consisting of (1) whether the Due

Process Clause is satisfied and (2) whether the Commerce Clause "substantial nexus" test is met before the state can impose tax collection responsibilities.

The due process test will be met if requiring the retailer to collect state sales tax is fundamentally fair to the retailer. If the retailer intentionally avails itself of the benefits of the taxing state's economic market, then due process is satisfied. *Quill* at 1910.

Notwithstanding the fact that due process has been met, a business must also have a physical presence in the taxing state in order for the "substantial nexus" test to be met under the Commerce Clause and before a state can impose tax collection responsibilities on an out-of-State retailer. A physical presence does not require an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, even if temporary, will trigger Use Tax collection responsibilities.

The concept of substantial nexus has been discussed by the U.S. Supreme Court in other cases. It is important to remember that the U.S. Supreme Court in its analysis of the Commerce Clause has concluded that the Constitution confers no immunity from State taxation on interstate commerce and that interstate commerce must bear its fair share of the state tax burden, assuming, of course, the existence of nexus between the taxing jurisdiction and the business or activity being taxed. *Washington Revenue Dept. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734 (1978); *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 444 (1979); *Goldberg v. Sweet*, 488 U.S. 252 (1989).

As long as the conditions of the four-part test established by the U.S. Supreme Court in *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977), are fulfilled, no impermissible burden on interstate commerce will exist. These four parts are whether the tax:

- (1) is applied to an activity with a substantial nexus to the taxing state;
- (2) is fairly apportioned;
- (3) does not discriminate against interstate commerce; and
- (4) is fairly related to the services provided by the State.

I hope this information is helpful. The Department of Revenue maintains a Web site which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Gina Roccaforte
Associate Counsel